



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

July 1, 2016

Jeffery Smith, Ed.D.
Superintendent
Hampton City Schools
One Franklin Street
Hampton, Virginia 23669

Re: OCR Case No. 11-14-1321

Dear Dr. Smith:

On June 15, 2016, the U.S. Department of Education, Office for Civil Rights (OCR) issued a Letter of Impending Enforcement Action in the above-referenced complaint against Hampton City Schools (the Division). The complainant alleged in part¹ that the Division retaliated against her for her advocacy on behalf of her XXXX (the Student) when it informed the complainant's employer, XXXX (the Contractor), that it did not want the complainant to continue working as a XXXX in the Division's school, which resulted in the termination of her services. The Letter of Impending Enforcement Action reiterated OCR's finding that the Division violated Section 504 of the Rehabilitation Act of 1973 (Section 504), 34 C.F.R. Part 104, and Title II of the Americans with Disabilities Act of 1990 (Title II), 28 C.F.R. Part 35, and notified the Division that its failure to resolve the identified violation will result in OCR's initiation of administrative enforcement proceedings or referral of the case to the U. S. Department of Justice for judicial proceedings.

OCR enforces Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability in programs and activities that receive Federal financial assistance from the Department. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. Section 504 and its implementing regulation at 34 C.F.R. § 104.61 (incorporating 34 C.F.R. §100.7(e) by reference) and Title II and its implementing regulation at 28 C.F.R. § 35.134 make it unlawful to retaliate

¹ The complainant asserted five other allegations of disability discrimination or retaliation in the above-referenced complaint. OCR determined that there was insufficient evidence to support a conclusion that the Division violated Section 504 or Title II with regard to each of these five allegations. Accordingly, OCR closed the allegations in the letter of findings that it issued to the Division on January 21, 2016.

against an individual for the purpose of interfering with any right or privilege secured by these laws.²

Findings of Fact

The complainant has been employed since XXXX as a XXXX by the Contractor. In this capacity, the complainant provides XXXX PORTION OF SENTENCE REDACTED XXXX students for divisions that contract for her services through the Contractor. Beginning in XXXX, the Division contracted with the Contractor for the complainant to provide services as a XXXX for students enrolled in the Division’s XXXX. Prior to XXXX, the complainant provided these services to other schools in the Division. OCR obtained copies of the complainant’s performance ratings for her work in the Division for calendar years XXXX, XXXX, and XXXX; for each of those rating years, the complainant received an overall performance rating of “S,” which, according to the Contractor’s rating system, indicates that “the employee meets expectations.”

During the XXXX school year, the Student was enrolled in the Division as a XXXX student at XXXX, and she received services through an Individualized Education Program (IEP) for a XXXX and XXXX. During the XXXX school year, five IEP meetings were held for the Student.³

During the XXXX school year, the complainant communicated with Division staff in writing and orally concerning the Student’s IEP.

Complainant’s e-mails to Division staff regarding the Student’s IEP

XXXX THREE PARAGRAPHS REDACTED XXXX

² 34 C.F.R. § 104.61: The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 100.6-100.10 and part 101 of this title.

34 C.F.R. § 100.7(e): No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

28 C.F.R. § 35.134: (a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part. (b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise of enjoyment of, any right granted or protected by the Act or this part.

³XXXX: The meeting was held to amend the Student’s IEP XXXX PORTION OF SENTENCE REDACTED XXXX.

XXXX: The meeting clarified goals and objectives of the Student’s IEP and addressed certain proposed changes to the IEP.

XXXX: The meeting was held because the complainant had expressed concerns about the XXXX PORTION OF SENTENCE REDACTED XXXX.

XXXX: The annual review of the Student’s IEP was conducted at this meeting.

XXXX: The meeting was held to consider adding XXXX PORTION OF SENTENCE REDACTED.

The complainant's communication with Division staff during the Student's IEP meetings

XXXX TWO PARAGRAPHS REDACTED XXXX

Staff observations concerning the complainant's conduct

The then Superintendent of the Division stated to OCR that she was concerned about the complainant's e-mail of XXXX, and, specifically, her use of the phrase "XXXX." The Superintendent asserted that she had no knowledge of the complainant's work performance at XXXX.

The Director stated to OCR that he had communicated by telephone with the complainant in XXXX or XXXX 2014 in response to the complainant's concerns regarding the confidentiality of the Student's special education status. The Director also stated that the complainant wanted IEP meetings to be held more frequently and that he had to explain to her that meetings could not be held whenever she requested them and that they must be scheduled during school hours. He stated that he was aware of phone calls between the complainant and the Principal during which the complainant made what he characterized as "irrational demands" to schedule IEP meetings outside of school and working hours. He also described the complainant's email of XXXX as "accusatory" and an example of an occasion when the complainant would not work with staff in the IEP meeting because she believed they were lying and covering up their actions. The Director stated that he briefed the former Superintendent regarding his concerns about the complainant in late XXXX or early XXXX. The Director said that at the IEP meeting that was held on XXXX, the complainant accused a staff member of a breach of confidentiality and said that she did not want him to attend the remainder of the meeting. The Director stated that he had never had a concern about the complainant's work performance at XXXX.

The Principal of XXXX stated to OCR that the complainant "verbally attacked" staff members at an IEP meeting for the Student that was held on XXXX, stating that when XXXX staff would cite specific information during the meeting, the complainant would "throw it back at" the staff, making the meeting "very uncomfortable." The Principal stated that the staff was afraid to interact with the complainant and they felt as if they never knew what situation would "set [the complainant] off." The Principal also expressed concern about the complainant's e-mail of XXXX, citing the complainant's reference to "lying and unprofessional XXXX XXXX." The Principal said that it was "draining" to deal with the complainant, but she was not aware of anyone's "personal or physical safety [being] at risk" due to the complainant's conduct or of anyone feeling threatened by the complainant.

The Assistant Principal of XXXX reported to OCR that when the complainant was in XXXX to attend IEP meetings for the Student, she would not speak to or look at her or other staff. She stated that the complainant sent emails that were "aggressive," citing the e-mail of XXXX. She also asserted to OCR that she once answered a phone call from the complainant during which the complainant was "agitated and aggressive" in asking for the school resource officer's phone number because she wanted to press charges XXXX PORTION OF SENTENCE REDACTED XXXX. She stated that at IEP meetings the complainant was generally quiet but would interrupt other speakers; she added that she did not feel that she was in danger from the complainant.

The Principal of XXXX, the school where the complainant was employed as a XXXX, informed OCR that she never had any problems with the complainant or her conduct at that school. She stated that the complainant had received positive performance reviews.

The termination of complainant's services with the Division

On XXXX, the Division's XXXX called the Contractor to inform it that the Division's then Superintendent had concerns about the complainant's professionalism and questioned whether the complainant was a "good fit as a XXXX" within the Division. On XXXX, the Contractor informed the complainant that she was no longer assigned to work in the Division and was instead assigned to work in a neighboring division. On XXXX, the Contractor sent an e-mail to the complainant that stated, "Your move XXXX PORTION OF SENTENCE REDACTED XXXX had nothing to do with any performance problems. It was unrelated to your job duties or work."

Analysis

In order to establish a prima facie case of retaliation, OCR must find the following:

- 1) the complainant engaged in a protected activity;
- 2) the Division took a materially adverse action against the complainant; and
- 3) that a causal connection exists between the protected activity and the materially adverse action.

If a prima facie case has been established, OCR then determines whether the Division has a legitimate, non-retaliatory reason for its materially adverse action. If a non-retaliatory reason for the materially adverse action exists, OCR must determine whether the recipient's reason is genuine or is a pretext for retaliation.

Protected activity

In order for OCR to find that an individual engaged in a protected activity, the activity must challenge an act or policy that is covered by any of the statutes that are enforced by OCR. The above-cited regulations implementing Section 504 and Title II make it unlawful to retaliate against an individual because the individual opposed any practice made unlawful under those statutes. To constitute opposition in the retaliation context, OCR must find that an individual communicated, formally or informally, a belief that a recipient's act or policy is discriminatory. Advocacy on behalf of another individual's right to be free from discrimination that is prohibited by Section 504 and Title II constitutes protected opposition under these statutes and is therefore a protected activity, unless the manner of the opposition is found to be so disruptive, excessive or inimical to the recipient's interest that it interferes with the effective functioning of the school or the IEP process, or where an individual's conduct so interferes with the performance of her job that it renders her ineffective in the position for which she was employed. OCR balances the statutorily protected rights of individuals to engage in activities to oppose discrimination against the recipient's interest in maintaining an effective and productive work environment.

The complainant's communications with the Division expressed her belief that the Division violated the Student's civil rights and that the Division was retaliating against the complainant

for attempting to ensure that the Student’s civil rights were not violated. Viewed in their totality, the complainant’s communications with the Division were not so disruptive, excessive or inimical to the Division’s interests that they interfered with the effective functioning of the school or the Student’s IEP process, nor did they interfere with the complainant’s work performance during the XXXX school year.

The complainant’s conduct at the two IEP meetings that she attended in the XXXX school year (XXXX and XXXX), while contentious, was not so disruptive as to interfere with the IEP team’s ability to perform its functions; both IEP meetings accomplished their respective purposes.⁴ In fact, one Division witness stated that the complainant was generally quiet during IEP meetings, although she would interrupt other speakers. Likewise, there is no evidence that the complainant’s two e-mails, and, in particular, the e-mail of XXXX, in which she stated that she “had never seen so many lying and unprofessional XXXX XXXX in my life,” interfered with the Student’s IEP process. In addition, although the complainant’s “demands” that IEP meetings be held more frequently and that they be scheduled outside of school and working hours were not practicable, there is no evidence that they were disruptive or excessive.

Accordingly, OCR found that the complainant’s communications with Division staff concerning the Student’s IEP during the XXXX school year constituted protected activities.

Materially adverse action

OCR must find that the complainant experienced a materially adverse action. A materially adverse action is one that could dissuade a reasonable person from making a complaint or engaging in a protected activity. Whether an action is materially adverse is judged from the perspective of a reasonable person in the complainant’s position.

The Division, which is a client of the Contractor, informed the Contractor, through its attorney, that the Superintendent of the Division had concerns about the complainant’s professionalism and questioned whether she was a “good fit as a XXXX” in the Division. This statement to the Contractor from the attorney representing the Division setting forth the concerns of the Division’s chief executive-the Superintendent-effectively resulted in the termination of the complainant’s services in the Division. Accordingly, OCR found that the Division’s call to the Contractor was a materially adverse action.

Causal connection

OCR must determine whether the evidence demonstrates that the Division took the materially adverse action because the complainant engaged in the protected activity. In determining whether a preponderance of the evidence demonstrates that the materially adverse action was taken because the complainant engaged in protected activity, OCR looks at the facts and circumstances as a whole.

⁴IEP meeting of XXXX: As a result of the annual review of the Student’s IEP at this meeting, XXXX PORTION OF SENTENCE REDACTED XXXX.

IEP meeting of XXXX: As a result of this IEP meeting, XXXX FIVE SENTENCES REDACTED XXXX.

The complainant’s protected activities that are at issue in this complaint occurred between XXXX and XXXX. The concerns about the complainant that the Division asserted in its call to the Contractor are based on the complainant’s communications about the Student’s IEP (e.g., complainant’s e-mail of XXXX, complainant’s accusation during an IEP meeting on XXXX, that a staff member had breached confidentiality, “irrational demands” regarding the scheduling of IEP meetings). OCR determined that the evidence established that a causal connection exists between the complainant’s protected activities and the Division’s call to the Contractor.

Legitimate non-retaliatory reason for the materially adverse action and pretext

After OCR determines that a prima facie case of retaliation has been established, OCR determines whether the recipient has a facially legitimate, non-retaliatory reason for the materially adverse action. If the recipient has a facially legitimate, non-retaliatory reason for the adverse action, OCR then determines whether the recipient’s stated reason is genuine or is a pretext for unlawful retaliation.

The Division asserted that it had a legitimate non-retaliatory reason for calling the Contractor in XXXX because it had concerns about the complainant’s professionalism and questioned the complainant’s “ability to fulfill her job duties as a XXXX.” However, contrary to the Division’s assertions, the complainant’s performance rating for the period from XXXX to XXXX, states as follows:

Critical Job Task: XXXX SENTENCE REDACTED XXXX.

Performance Outcome Results: XXXX TWO SENTENCES REDACTED XXXX.

Annual Appraisal Rating: S [Meets performance expectations.]

Critical Job Task: XXXX SENTENCE REDACTED XXXX.

Performance Outcome Results: XXXX SENTENCE REDACTED XXXX.

Annual Appraisal Rating: S [Meets performance expectations.]

Proficiency Factor: *Teamwork. Cooperate with peers in accomplishing [Contractor] goals; demonstrates willingness to work with others, respectfully interacts with others. Follows agency/program policies and procedures.*

Proficiency Outcome Results: “[The complainant] works in a team setting, as well as independently She has consistently been a positive team-player in Hampton XXXX, as per previous supervisor’s report.”

Annual Appraisal Rating: E [Exceeds performance expectations.]

In addition, the principal of the school where the complainant was employed as a XXXX reported to OCR that she had no problems with the complainant’s work performance, and the Contractor confirmed that the complainant was not removed from the Division because of her work performance. The evidence thus establishes that the termination of the complainant’s services with the Division and the Contractor’s separate and independent action to reassign the complainant to a neighboring division was not related to her work performance.

OCR also notes that the Division had other options for addressing its concerns about the complainant that were less adverse than the termination of her services. For example, the Division could have warned the complainant or it could have limited or revoked her access to

IEP meetings or to the school.⁵ Without more, the Division’s failure to take these steps shows that the Division’s unsupported assertion that the complainant was not a “good fit” for her job as a XXXX in the Division, which triggered the termination of her services, was pretextual. Furthermore, the Division’s termination of the complainant’s services did not address the Division’s concerns about the complainant’s conduct during the XXXX school year. In its letter to OCR of September 23, 2015, the Division reported that the complainant’s “inappropriate behavior toward school staff members continued to escalate during the XXXX school year.”

Accordingly, OCR found that the Division’s asserted facially legitimate, non-retaliatory reason for contacting the Contractor was a pretext for retaliation.

Conclusion

Based on the foregoing, OCR determined that the Division retaliated against the complainant in violation of Section 504 and Title II and their implementing regulations.

On June 29, 2016, OCR received the signed copy of the enclosed Resolution Agreement (Agreement) from the Division. Under the Agreement, the Division agreed to take actions to remedy the violation, including the following:

- Amend the Division’s policies to prohibit retaliation against individuals who have engaged in activities protected by federal law and identify the procedure for filing a complaint alleging retaliation.
- Disseminate a memorandum to all Division administrators that provides information on unlawful retaliation.
- Post a notice stating that the Division prohibits retaliation against individuals who have engaged in activities protected by federal law. The notice will also reference the procedure for filing a complaint alleging retaliation and state that the Division was found by OCR to have engaged in unlawful retaliation.
- Provide training to administrators on retaliation.
- Compensate, as appropriate, the complainant for damages that she incurred due to the change in her work location during the XXXX and XXXX school years.

The Agreement is designed, when fully implemented, to resolve this complaint and remedy the Division’s Section 504 and Title II violation. OCR will monitor implementation of the Agreement until the Division has fulfilled the terms of the Agreement and is in compliance with Section 504 and Title II and their implementing regulations that were at issue in this case. OCR will monitor closely the Division’s implementation of the Agreement to ensure that the commitments made are implemented timely and effectively. If the Division fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10) or judicial proceedings to enforce the Agreement,

⁵ OCR asked the Division how other parents were treated when they engaged in behavior similar to or worse than the complainant’s behavior. The Division provided examples of other parents who made excessive phone calls to Division staff, directed profanity at Division staff, and exhibited other aggressive behaviors (e.g., one parent assaulted a child). The Division’s records indicated that all of those parents were either warned about their conduct or had their access to Division property limited or revoked.

OCR shall give the Division written notice of the alleged breach and sixty (60) calendar days to cure the breach.

Based on the commitments the Division made in the Agreement, OCR has determined that it is appropriate to consider this complaint resolved. This resolution letter sets forth OCR's determination in an individual case and should not be construed to cover any other issue retarding the Division's compliance. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the Division may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, a complaint may be filed alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. The complainant may file a private suit in federal court, whether or not OCR finds a violation.

If you or your staff members have any questions about this matter, please do not hesitate to contact OCR's Chief Attorney, Ralph A. Suris, at (202)401-1443 or via e-mail at Ralph.Suris@ed.gov.

Sincerely,

/s/

Alice B. Wender
Regional Director

Enclosure

cc: Patrick T. Andriano, Esq.
Kathleen S. Mehfoud, Esq.